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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 35, OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Petitioner,

v.

CITY OF HARTFORD, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinions Below

The district court's opinion is reported at 462 F. Supp. 1271, and the Second Circuit's opinion is reported at 625 F.2d 416. Both opinions are reprinted in the appendix filed with the petition.

Statement of the Case

The Petitioner, Local Union No. 35 of the International Brotherhood of Electrical Workers, challenges the City of Hartford's Affirmative Action Ordinance and Plan for the hiring of minority workers on city-financed construction projects. The Petitioner seeks to halt implementation of the Hartford Ordinance with respect to the electrical construction trades.

The events leading to the enactment of the Hartford Ordinance and Plan began in 1970 when local civil rights leaders met with Hartford's Deputy Mayor, Nicholas Carbone, to protest the exclusion of minority workers from the building trades industry. This meeting occurred shortly after the City had experienced serious civil disturbances in the lower income black community. The leaders focused on discrimination in the building trades unions as the City was entering a period of major municipal construction. These leaders demanded that the City act to insure that minority workers would be employed on the City projects.

In response to this protest, the Deputy Mayor brought together representatives from the Hartford Building Trades Council, the trade unions and the minority community to discuss and negotiate methods for increasing minority involvement in the construction trades. These negotiations ultimately led to the adoption in September 1970 of a voluntary affirmative action plan for the Hartford construction industry. The plan called for gradually increasing the proportion of minority group persons in the craft trades to a level of 15% for each trade, the increases to occur over a five year period (Ct. of App. Jt. App. A142-143).

Unfortunately, after the announcement of the voluntary effort, virtually no action was taken to implement the plan and only a few of the building trade unions actually subscribed to the program. In mid-1974, the community representatives again complained to the Deputy Mayor of discrimination in the skilled trades and the exclusion of minority workers from the city job sites (Ct. of App. Jt. App. A143).

In the face of non-compliance with the voluntary plan, the Deputy Mayor again contacted the building trades

representatives and advised them that the City was compelled to enact remedial legislation. The Deputy Mayor asked for and obtained the assistance of the trades in the drafting of a new ordinance. The Ordinance ultimately enacted permitted Hartford to implement essentially the same plan that had been negotiated voluntarily in the early 1970's (Ct. of App. Jt. App. A143-144).

Hartford's Court of Common Council adopted the Ordinance on February 9, 1975. The Council set forth in the Ordinance that it sought to ensure, ". . . equal employment opportunity for minority group persons and women in all phases of construction work, including the bidding process, performed pursuant to major contracts offered and awarded by the city under the provisions of the Charter and this Code" (A71). Through a series of legislative findings the Council made clear that it was acting in response to a clear pattern of discrimination among contractors and unions in the Hartford construction industry. The Ordinance states:

> (a) Many contractors, labor unions, hiring halls, crafts and trades in the construction industry in the Greater Hartford area have discriminated, and continue to discriminate, against minority group persons and women.
>
> (b) It is the intention of the City not to aid or abet such discrimination by awarding contracts to contractors who practice or have practiced discrimination against minority group persons and women, or who have subcontracted to, or engaged the services of, individuals and organizations that deny or have denied equal employment opportunity to minority group persons and women.
>
> (c) The continuing effects of past and present discrimination against minority group persons and women by the construction industry may be prevented,

> mitigated and/or eliminated by an affirmative action plan.
>
> (d) There is a sufficient number of qualified minority group workers and women in the Greater Hartford Area to make such an affirmative action plan feasible and desirable (A71).

Hartford structured its ordinance to encourage minority hiring on City construction projects through the placing of principal responsibility on City contractors. Those contractors submitting bids on Hartford projects are required to provide affidavits by all their subcontractors and unions with employment referral arrangements attesting to the agreement by these entities to abide by the Affirmative Action Plan and goals. The Ordinance also directed that the Council adopt an Affirmative Action Plan which would be included as a contractual provision in all major City construction contracts. The Ordinance mandates that the Plan establish "reasonable minimum percentage goals for minority group and female employment in the construction industry . . ." (A74).

In accordance with the directive of the Ordinance, the Council adopted the Affirmative Action Plan pursuant to which signatory contractors are required to make a "good faith effort" to achieve a level of minority employment on City jobs of at least 15% on a trade by trade basis (A85-87).

The petitioner repeatedly advised the district court that it did not challenge the legality of the Hartford Ordinance or Plan *per se,* nor did it contest the basic underlying legislative findings contained in the Ordinance regarding discrimination against minority workers in the Hartford building trades. Instead, the petitioner only contended that the Plan was unlawful as applied to the petitioner, as there had been no specific finding of discrimination with respect to the activities of Local 35 (A11; Ct. of App. Jt. App. A178, 132-137).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Second Circuit's decision does not conflict with the decisions of this Court.

The petitioner seeks to raise issues already fully reviewed and resolved by this Court in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979); and *Fullilove* v. *Klutznick*, 65 L. Ed. 2d 902 (1980). These cases make clear that a race conscious remedial program may be undertaken by a governmental entity in order to overcome a consistent pattern of past discrimination.

In *Bakke*, the Court stated that it is permissible for a governmental entity to afford preferential treatment to minority citizens who have suffered from past discrimination:

> . . . where a legislative or administrative body charged with responsibility made determinations of past discrimination by the industries affected and fashioned remedies deemed appropriate to rectify the discrimination. E.g., *Contractors Association of Eastern Pa.* v. *Sec'y of Labor*, 442 F. 2d 159 (CA 3), *cert. denied*, 404 U.S. 954 (1971); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F. 2d 9 (CA 1 1973), *cert. denied*, 416 U.S. 957 (1974). 438 U.S. at 301-02.

The Hartford Council did in fact set forth in the Ordinance the prescribed findings of past discrimination with respect to the industries affected by its affirmative action program. The petitioner neither challenged those findings,

nor questioned the propriety of the Ordinance itself.* Furthermore, the petitioner did not take issue with the City's proof that Hartford trade union officials themselves, recognizing the long-standing exclusion of minority workers from the trade unions, participated in drafting both the initial voluntary affirmative action plan and the subsequent Ordinance (see Ct. of App. Jt. App. A145).

Petitioner argues instead that the Ordinance and Plan is unconstitutional as applied to it as the City did not particularize any findings of discrimination in Local 35. The Second Circuit rejected this argument, stating:

> . . . a valid affirmative action plan need not be based on a particularized finding of past discrimination by every employer or union affected. It is enough that there is a finding of discrimination in the industry concerned. To hold otherwise would enable parts of the industry to frustrate the plan by assigning various functions to those who had not previously discriminated (A11).

The lower court's ruling is obviously correct in light of Justice Powell's approval in *Bakke* of the *Contractors Association* and *Altschuler rulings. Bakke, supra,* 438 U.S. at 301-02. In both the *Contractors Association* and *Altschuler* matters, the circuit courts upheld affirmative action plans involving industry-wide findings of discrimination in the building trades.

The record below does show that as late as 1969, the percentage of blacks employed as skilled electricians in

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* In one memorandum, for example, the petitioner advised the District Court that it was not making a general attack on the City's affirmative action plan and, "is not challenging for the purpose of its motion for summary judgment the City's legislative finding that, as a general proposition, there has been discrimination in the construction industry. . . ." (Pls. Reply Br. to Defts. Supplemental Memorandum, p. 4).

Connecticut was only 0.7% (A 11), thus confirming that the petitioner was one of the trade unions from which minority craftsmen had been excluded. Also, the pervasive pattern of discrimination that exists throughout the craft unions led Justice Brennan, writing for the majority in *Weber*, to state that, "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusions a proper subject for judicial notice." *Weber, supra*, 443 U.S. at 198, n. 1.

Petitioner also contends that the City of Hartford, as a subordinate governmental institution, is not an appropriate entity with authority to legislate an affirmative action program. This assertion simply ignores the fact that affirmative action programs adopted at the municipal level repeatedly have been upheld by the courts. See *Detroit Police Officers Association* v. *Young*, 608 F. 2d 671 (6th Cir. 1979), *pet. for cert. pending*, No. 79-1061; *Baker* v. *City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979); *Doores* v. *MacNamara*, 476 F. Supp. 987 (W.D. Mo. 1979). See also *United States* v. *City of Miami, Florida*, 614 F. 2d 1322 (5th Cir. 1980);

The Petitioner, in arguing that a municipality lacks authority to adopt an affirmative action ordinance, cites to *Associated Gen. ETC.* v. *San Francisco Unified Sch.*, 616 F. 2d 1381 (9th Cir. 1980) and *Fullilove* v. *Klutznick*, *supra*. Neither of these decisions, however, supports petitioner's claim. In *Associated General*, the affirmative action program promulgated by a state agency mandated activity which was in direct conflict with the provisions of an act adopted by the state legislature. The Ninth Circuit held that in such a situation the administrative regulations must give way to the legislative enactment. The state legislature, the court noted, clearly is the body with overriding authority and is directly accountable through the electoral process to the people. No such conflict exists in

the instant matter as Hartford's program was adopted by the city's legislative arm and is not in conflict with state law.

This Court's ruling in *Fullilove* does not in any way indicate that Hartford was foreclosed from promulgating race conscious remedial legislation. This Court stated that special deference must be given to Congress when it undertakes to legislate within its constitutional powers. Nothing in the *Fullilove* ruling, however, in any way implies that the Court intended to limit the authority of other public entities to adopt affirmative action programs. The petitioner's argument that *Fullilove* is to be read in this restrictive manner also ignores the clear thrust of *Bakke* that local governmental bodies may undertake affirmative action efforts.

Certainly, the principal and largest municipality in Connecticut is an entity with sufficient authority and responsibility to undertake an affirmative action effort. This is especially true when the effort is directed at eliminating discrimination with respect to the carrying out of City contracts.

Furthermore, there is no merit in the petitioner's claim that Hartford's 15% minority hiring goal is unreasonable. The petitioner argues that northern Connecticut, Local 35's jurisdiction, had a minority population of about 7%, a figure which is approximately the same as Local 35's minority membership and, therefore, the 15% goal is excessive. The petitioner fails to note, however, that in 1970 when the issue of discrimination arose before the Council, 35.5% of Hartford's population was minority and that percentage has increased substantially since the census. Moreover, it was not until the petitioner reached the Court of Appeals that it challenged for the first time the 15% Hartford goal and sought to challenge the legislative finding that there were sufficient qualified minority and female

workers available to make the hiring of minorities on city contracts to the level of 15% both possible and desirable (A13).

Finally, the petitioner made no showing to justify a review of its claim that the Hartford plan violates Title VII of the Civil Rights Act of 1964. In the instant matter, as in *Weber*, the affirmative action plan is "designed to break down old patterns of racial segregation and hierarchy," is temporary in nature and does not unnecessarily trample the interests of white employees. The Second Circuit was obviously correct when it held that, "The Ordinance and Plan before us have a less significant impact on nonminority workers than did the Plan in the *Weber* case . . ." (A18).

II.

There are no valid state law challenges to the Hartford Ordinance.

The petitioner raises several state claims in challenging the Hartford affirmative action program.

First, the petitioner argues that Hartford had no authority to adopt the Ordinance or Plan. This argument fails, however, in light of the City's clear delegated power to enter into contracts and to establish regulations with respect to the making and carrying out of its contracts. The Hartford City Charter specifically states in Chapter VIII, § 11 that, "The council shall establish by ordinance, rules and regulations under which contracts shall be made and carried out for all public works and improvements" (Petition, pp. xviii-xix).* In addition, the Charter extends

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* Hartford's Charter was approved by the Connecticut Legislature pursuant to Special Act No. 30, 1947 Session of the General Assembly. Furthermore, pursuant to § 7194 of the Connecticut General Statutes, municipalities which have adopted charters are granted the authority to enter into contracts.

to the Council (Chap. II, § 5) general power to "adopt ordinances . . . for the preservation of the public peace, health, safety, comfort and welfare of the inhabitants of the city . . ." (Petition, p. xviii). Local 35 does not even attempt to explain why the City would be foreclosed under these delegated powers from undertaking the challenged program.

Second, the petitioner argues that the Hartford program runs afoul of the state constitutional provision insuring equal protection of the laws and prohibiting discrimination and the Connecticut Fair Employment Practices Law which bars discrimination in employment. The petitioner has presented no Connecticut authority, however, to support its argument that these provisions prohibit race conscious affirmative action efforts and are to be construed in a fashion contrary to Title VII. Indeed the Connecticut courts have held that the equal protection and non-discrimination clauses of the state and federal constitutions have substantially the same meaning. *Snyder* v. *Town of Newton*, 417 Conn. 374, 381, 161 A. 2d 770 (1960).

Local 35 commenced this action in federal court, and, from the outset, relied principally on federal claims in challenging the Hartford program. When the district court rejected its challenges based on federal laws, the petitioner began to press state court claims and demanded that the federal court apply the doctrine of abstention. The courts below properly ruled upon petitioner's state asserted claims and the matter was resolved properly in the federal courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

December 24, 1980

Respectfully submitted,

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